

TO: Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK
---	---

In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been
 filed in the U.S. District Court Western Dist., Austin Div. on the following ☒ Patents or ☐ Trademarks:

DOCKET NO. 1:09-cv-126 SS	DATE FILED 2/20/2009	U.S. DISTRICT COURT Western Dist., Austin Div.
PLAINTIFF HawgLite, L.L.C.		DEFENDANT Joseph DiCarlo
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 see attached		
2 7,021,784		
3		
4		
5		

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY		
	<input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading		
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK	
1			
2			
3			
4			
5			

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK WILLIAM G. PUTNICKI	(BY) DEPUTY CLERK 	DATE FEB 23 2009
-------------------------------------	------------------------------	-----------------------------------

Copy 1—Upon initiation of action, mail this copy to Director Copy 3—Upon termination of action, mail this copy to Director
 Copy 2—Upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

has endeavored to foreclose competition and has engaged in acts that have no purpose than to hinder competition.

35. Accordingly, a present and actual controversy exists between HawgLite and DiCarlo as to the validity, enforceability and infringement of the '784 Patent. HawgLite is being harmed, and will continue to be harmed, until such controversy is resolved.

36. Under the Declaratory Judgment Act and TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*, HawgLite seeks a declaration that the '784 Patent is invalid, unenforceable and not infringed by HawgLite.

37. HawgLite is entitled to an award of all damages it has incurred.

38. HawgLite is also entitled to recover its reasonable costs and attorneys' fees under the Declaratory Judgment Act and TEX. CIV. PRAC. & REM. CODE § 37.009 as well as under 35 U.S.C. § 285, as this is an exceptional case within the meaning of the federal patent statutes.

COUNT II
ATTEMPTED MONOPOLIZATION UNDER 15 U.S.C. §2
(SHERMAN ACT WALKER PROCESS CLAIM)

39. HawgLite realleges and incorporates herein the foregoing paragraphs.

40. On information and belief, DiCarlo had and continues to have the specific intent to monopolize the market for illuminated archery nocks and illuminated archery nock components when he committed the acts alleged herein.

41. But for the DiCarlo's fraudulent acts in procuring the '784 Patent, the '784 Patent would not have issued.

42. On information and belief, despite knowledge of his own fraudulent acts in procurement of the '784 Patent, DiCarlo continues to state that his "Archers Flame" archery nock

product is "patented" and markets it as such in an attempt to diminish competition and drive customers away from purchasing competitors' illuminated nock products.

43. On information and belief, the '784 Patent has potential exclusionary power in terms of the relevant market for lighted or illuminated archery nocks.

44. On information and belief, DiCarlo's specific intent was to hinder competition and monopolize the market for lighted or illuminated archery nocks when he committed the above acts.

45. HawgLite has been damaged as alleged herein by DiCarlo's acts.

46. On information and belief, unless enjoined by this Court, there exists a dangerous probability of DiCarlo's success in achieving a monopoly.

47. HawgLite has no adequate remedy at law.

COUNT III
FALSE DESCRIPTION AND
UNFAIR COMPETITION UNDER 15 U.S.C. § 1125

48. HawgLite realleges and incorporates herein the foregoing paragraphs.

49. In connection with DiCarlo's promotion of his goods and services as alleged herein and as shown in Exhibit B, DiCarlo has misrepresented the nature and characteristics of his "Archers Flame" product.

50. DiCarlo's statements, including those implying that his "Archers Flame" product is protected by a valid and enforceable patent, constitute false or misleading descriptions of fact and/or false and misleading representations of fact which, as a consequence, are likely to divert and/or have diverted customers away from HawgLite.

51. On information and belief, DiCarlo, by his acts as alleged herein, has caused his misleading advertising and promotion to be communicated in interstate commerce and within this judicial district.

52. DiCarlo's acts, as alleged above, including the continued use of false representations in commercial advertising or promotion, misrepresent the nature, characteristics, and/or qualities of DiCarlo's goods, services, or commercial activities in violation of the Lanham Act, 15 U.S.C. § 1125(a).

53. DiCarlo's conduct has caused and, if not enjoined, will continue to cause, damage to HawgLite and irreparable damage to HawgLite's good name, reputation and goodwill in a manner that cannot be fully compensated by monetary damages.

54. DiCarlo's false description and unfair competition will continue unless enjoined by this Court.

55. HawgLite has no adequate remedy at law.

COUNT IV
COMMON LAW UNFAIR COMPETITION

56. HawgLite realleges and incorporates herein the foregoing paragraphs.

57. Based on the facts contained herein, DiCarlo has been guilty of unfair competition and other unfair trade practices in violation of the Texas common law of unfair competition, causing HawgLite damages and loss of profits. DiCarlo's conduct has been intentional and willful in nature and will continue unless enjoined by this Court.

58. HawgLite has suffered actual damage and is entitled to exemplary and/or punitive damages.

59. HawgLite has no adequate remedy at law.

COUNT V
UNFAIR PRACTICES UNDER TEXAS BUS. & COM. CODE § 15.05

60. HawgLite realleges and incorporates herein the foregoing paragraphs.

61. DiCarlo's acts alleged above constitute unfair practices in violation of TEXAS BUS. & COM. CODE § 15.05.

62. The goal and intended effect of DiCarlo's above alleged acts is to lessen competition substantially in commerce in lighted archery nocks and lighted archery nock components.

63. HawgLite has suffered actual damages as specified herein.

64. DiCarlo's unlawful activities were willful and flagrant.

65. DiCarlo's unfair practices will continue unless enjoined by this Court.

66. HawgLite has no adequate remedy at law.

PRAYER

Accordingly, HawgLite prays for:

a. Preliminary injunctive relief and, upon final hearing, a permanent injunction enjoining and restraining DiCarlo, his agents, and all other persons acting in concert with him from:

i. Engaging in anti-competitive activities or unlawful practices within the meaning of TEX. BUS. & COM. CODE § 15.05 or otherwise unfairly competing with HawgLite;

ii. Misrepresenting the nature, quality and/or characteristics of DiCarlo's or HawgLite's goods or services; or

iii. Bringing suit against HawgLite in any other forum on any matter(s) related to or arising out of the facts and issues raised in this Complaint.

b. An order under 15 U.S.C. § 1116 directing DiCarlo to file with this Court, within thirty (30) days after any injunction that issues, a report in writing under oath setting forth in detail the manner and form in which DiCarlo has complied with the injunction;

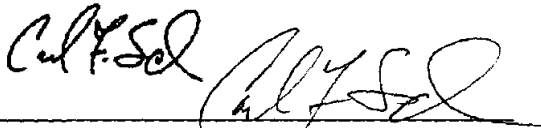
- c. An accounting by DiCarlo to HawgLite for all profits realized in connection with his activities alleged herein and an award in such amount to HawgLite;
- d. An award to HawgLite of treble its actual damages, any profits attributable to DiCarlo's wrongful acts, interest, costs of suit and attorneys' fees for an exceptional case under 15 U.S.C. § 1117 and 35 U.S.C. § 285;
- e. An award to HawgLite of treble its actual damages, interest, and costs of suit including reasonable attorneys' fees under 15 U.S.C. § 15 and TEX. BUS. & COM. CODE §15.21;
- f. An award to HawgLite of its compensatory damages, actual damages, and general damages and all exemplary and punitive damages as permitted by law for DiCarlo's tortious and unfairly competitive acts.
- g. A declaration that the '784 Patent and its each of its claims are invalid;
- i. A declaration that the '784 Patent is unenforceable;
- j. A declaration that HawgLite has not infringed upon any valid or enforceable claim of the '784 Patent;
- k. An award to HawgLite of its reasonable attorneys' fees and the costs of this action under Tex. Civ. Prac. & Rem. Code § 37.009 and as otherwise allowed by applicable law;
- l. Pre-judgment and post-judgment interest on any damage awards as permitted by law; and,
- n. Such other and further relief as allowed by law and as the Court may deem just, proper or necessary under the circumstances.

JURY DEMAND

HawgLite hereby demands trial by jury for all issues so triable.

Respectfully submitted,

LAW OFFICES OF CARL F. SCHWENKER

By: 

Carl F. Schwenker, Attorney-in-charge

Texas Bar No. 00788374

1621 West Sixth Street

Austin, Texas 78703

Tel. (512) 480-8427

Fax (512) 857-1294

ATTORNEYS FOR PLAINTIFF HAWGLITE, L.L.C.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2009 FEB 20 PM 2:37
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

HAWGLITE, L.L.C.,

Plaintiff,

v.

JOSEPH DICARLO,

Defendant.

CIVIL ACTION NO. _____

A09CA 126SS

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff HawgLite, L.L.C. states as follows for its complaint against Defendant Joseph DiCarlo:

PARTIES

1. Plaintiff HawgLite, L.L.C. ("HawgLite") is a Texas limited liability company with its registered address at 4420 County Road 406, Taylor, Texas 76574 and its principal place of business in Coupland, Texas.

2. On information and belief, Defendant Joseph DiCarlo ("DiCarlo") resides and may be served at 7 Pickett Terrace, Wheeling, West Virginia 26003 and/or at his ordinary place of business at 1223 Market Street, Wheeling, West Virginia 26003.

NATURE OF THE CLAIMS

3. This is an action for damages, injunctive relief and a declaratory judgment.
4. HawgLite seeks injunctive and monetary relief for, *inter alia*, violations of the Sherman Act; false description and unfair competition under 15 U.S.C. § 1125(a); common law unfair competition; and unfair practices under TEX. BUS. & COM. CODE ANN. §15.05 (Vernon

1991). HawgLite also seeks a declaration that DiCarlo's U.S. Patent No. 7,021,784 ("the '784 Patent") is not infringed by HawgLite's "Po' Nock" archerynock kit (the "*Po' Nock*") and that the '784 Patent is invalid and unenforceable.

5. All causes of action are based on the same operative facts.

JURISDICTION AND VENUE

6. This action arises under the patent laws of the United States (35 U.S.C. § 101 *et seq.*), the Lanham Act (15 U.S.C. § 1125(a)), the Sherman Act (15 U.S.C. §§ 1-2), the federal Declaratory Judgment Act (28 U.S.C. § 2201, *et seq.*) and the laws of the State of Texas.

7. Accordingly, this Court has subject matter jurisdiction over this action under 15 U.S.C. § 1121 (actions arising under the Lanham Act) and 28 U.S.C. §§ 1331, 1338 and 1367(a) (federal question jurisdiction, exclusive jurisdiction over patent-related cases, and supplemental jurisdiction over related state law claims).

8. DiCarlo has transacted business, including the acts described below, within this judicial district. DiCarlo has had sufficient minimum contacts with the State of Texas and this judicial district so that requiring DiCarlo to respond to this action would not violate due process.

9. Specifically, DiCarlo markets, promotes, advertises and sells his "Archers Flame" archerynock product—a product that is at issue in this suit—within this judicial district (including via the internet at DiCarlo's www.archersflame.com website) and has made sales and shipments of his "Archers Flame" archerynock product into this judicial district.

10. Further, DiCarlo has alleged in a letter sent to HawgLite's address within this Court's jurisdiction that HawgLite is infringing DiCarlo's '784 Patent, has demanded that HawgLite cease sales of its *Po' Nock* kit and has threatened to file a patent infringement action against HawgLite. (A true and correct copy of DiCarlo's attorney's letter is attached as Exhibit

A.) Hawglite disputes such allegations. Accordingly, an actual controversy exists and Hawglite has a reasonable apprehension that DiCarlo may initiate a lawsuit against it relating to the wrongfully obtained '784 Patent.

11. Thus, DiCarlo is subject to the personal jurisdiction of this Court and is amenable to service of process under the Texas long-arm statute, TEX. CIV. P. & REM. CODE §§ 17.041-.045 and FED. R. CIV. P. Rule 4(e).

12. HawgLite resides in and, as described herein, a substantial part of the events giving rise to these claims occurred within the jurisdiction of this Federal Court. Accordingly, venue is proper under 28 U.S.C. § 1391(b) and (c).

BACKGROUND FACTS

HawgLite

13. HawgLite is a small central Texas company that designs, manufactures and sells a diversified line of archery, bow-hunting and other hunting-related products. HawgLite owns the www.hawglite.com website and advertises and promotes a number of its products on that site.

14. HawgLite currently markets and sells to its customers a do-it-yourself kit called the "Po' Nock" (the *Po' Nock*) containing a packaged group of archery nock components that the customer may assemble at home to form a lighted archery nock. When assembled, the completed *Po' Nock* assembly attaches to the rear shaft of an arrow and lights up as the arrow is fired from a bow, allowing the archer or hunter to more easily aim, fire, locate and retrieve an arrow, particularly in low light conditions. The components in the *Po' Nock* kit consist of off-the-shelf standard archery and electronic components that have been commercially available from numerous suppliers for several years.

DiCarlo

15. On information and belief, DiCarlo owns and operates a West Virginia-based business that manufactures and sells a competing line of lighted archery nocks under the trade name "Archers Flame." DiCarlo markets, promotes, advertises and sells his "Archer's Flame" archery nocks to consumers within this judicial district and elsewhere, including via internet advertising and promotion via the World Wide Web at DiCarlo's main web page www.archersflame.com. (A true and correct copy of DiCarlo's main web page is attached as Exhibit B.) Figure 1, below, contain a photograph from one of DiCarlo's click-through web page displaying a sample of DiCarlo's "Archers Flame" product.

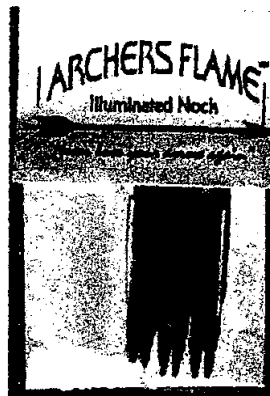


Figure 1. DiCarlo's "Archers Flame" product.

The Market – Illuminated Archery Nocks

16. For several decades, archery arrows have been designed to accommodate removable arrow nocks—a small end piece mounted at the tail end of the arrow shaft and having a small v-shaped notch for mounting or loading the arrow in the bow. The advent of removable arrow nocks and other components allowed archers to select from and mix-and-match various

arrow components such as the arrow head, shaft and nock to customize an arrow for the archer's desired application.

17. Numerous arrow nocks having a variety of features and applications have also been developed and have been commercially available for many years. More particularly, lighted or illuminated arrow nocks—translucent plastic nocks containing a power source such as a small battery, a light source such as a light-emitting diode (L.E.D.) and an on-off switching mechanism—have been commercially available and known to persons of ordinary skill in the field of archery since at least the early 1980's. Not surprisingly, the illumination allows the archer or hunter to more easily aim, fire, locate, and visually track and retrieve the arrow and/or the target, particularly in low light conditions.

18. These commercially-available illuminated arrow nocks have incorporated and utilized a variety of manual, automatic, timed, mechanical, magnetic, electronic and other switching mechanisms and switching components, all of which have been generally well known to persons of ordinary skill in the fields of archery or simple electronics and mechanics for many years. For example, U.S. Patent No. 4,340,930, entitled *Light Assembly for Archer's Arrow* and issued July 20, 1982 to Sam Carissimi (the "Carissimi '930 Patent"), discloses that:

One form of electrical switch means is described in the foregoing Specification as a manual switch upon the body of the arrow, *it is contemplated that other switches could also function to accomplish the same result. For example a switch may be a mercury switch, a magnetic switch, or an Inertia switch capable of closing the electrical circuit to the power source as desired.* Another form of electrical switch means may include a photo electric cell normally maintaining the circuit open during daylight. Under reduced daylight conditions including dusk, the switch automatically closes to energize the light circuit. Another form of electrical switch means includes the use of a remote radio signal to activate a receiver switch on the arrow to close such circuit

See Carissimi '930 Patent, Specification, col. 4, ll. 52 - 66 (emphasis added). Similarly, U.S.

Patent No. 5,134,552, entitled *Acceleration Activated Energizing Device* and issued July 20, 1982

to John Call (the "Call '552 Patent"), discloses an illuminated nock having an acceleration activated, spring-type inertial switching mechanism and U.S. Patent No. 4,547,837, entitled *Tracer Light* and issued October 15, 1985 to Tommy Bennett (the "Bennett '837 Patent"), discloses a manually-activated, screw-type switching mechanism.

19. Regardless of the particular switching method used, the switching mechanisms generally cause the nock to be illuminated prior to or approximately when the arrow is fired from the bow and to remain lit until the archer is able to retrieve the arrow.

20. Accordingly, illuminated archery nocks having a variety of switching mechanisms and methods of assembly were in public use and were well known to persons of ordinary skill in the field of archery and, on information and belief, to DiCarlo well prior to January 23, 2002.

21. On information and belief, sometime around 2001 DiCarlo began making his own illuminated archery nocks and selling them under the trade name "Archers Flame." The idea of providing these features in a nock had been in use for many years and it required no innovation on DiCarlo's part to conceive of or manufacture his "Archers Flame" nocks, in part because they too were assembled from commercially available archery and electronic components.

22. Nevertheless, on January 23, 2003, DiCarlo improperly applied for and eventually received a patent on a lighted archery nock. On information and belief, DiCarlo claims to presently own U.S. Patent No. 7,021,784 entitled *Archers Flame Illuminated Arrow Nock* (the "'784 patent"). On information and belief, the '784 patent issued on April 4, 2006 and names DiCarlo as its inventor.

COUNT I
DECLARATORY JUDGEMENT

23. HawgLite realleges and incorporates herein the foregoing paragraphs.

24. On or about February 1, 2009, HawgLite received a letter via certified U.S. mail at HawgLite's business address in Coupland, Texas from Mr. Ronald Wm. Kasserman, an attorney purporting to represent DiCarlo. A true and correct copy of the letter is attached as Exhibit A. Mr. Kasserman's letter states that DiCarlo owns the '784 Patent, alleges that HawgLite had "copied Joseph DiCarlo's process" and accuses HawgLite of offering to sell a product—the *Po' Nock* kit—that allegedly infringed the '784 Patent.

25. Although HawgLite believes and alleges that none of its products or manufacturing or sales activities fall within the valid and enforceable scope of any claims of the '784 Patent, DiCarlo has wrongfully asserted that HawgLite is infringing the '784 Patent and threatened to initiate a lawsuit against HawgLite.

26. On information and belief, the '784 Patent is invalid and unenforceable for failure to comply with one or more of the requirements and conditions of patentability in parts II and III of Title 35 of the United States Code, including but not limited to §§ 102, 103, 112, 251, as well as patent applicant DiCarlo's failure to comply with the regulations set forth in 37 C.F.R. and the Manual of Patent Examining Procedure.

27. On information and belief, DiCarlo is estopped by his actions before the United States Patent and Trademark Office in order to secure the allowance of the '784 Patent from asserting any valid scope of the '784 Patent which would cover HawgLite's *Po' Nock* kit and/or any product manufactured, used, sold, or offered for sale by HawgLite.

28. By his actions alleged herein, DiCarlo has attempted to impermissibly exploit or expand the physical and/or temporal scope his patent grant; such acts constitute patent misuse which renders the '784 Patent unenforceable against HawgLite.

29. On information and belief, the '784 Patent is unenforceable and DiCarlo is barred from obtaining any relief on the '784 Patent because of laches, estoppel, and unclean hands.

30. On information and belief, DiCarlo procured the '784 Patent by knowing and willful fraud on the Patent Office. Specifically, DiCarlo, failed to submit to the Patent Office during prosecution of the application for the '784 Patent material prior art of which DiCarlo was aware and intentionally misrepresented to the Patent Office that prior art which was disclosed.

31. On information and belief, DiCarlo threatened an infringement action against HawgLite despite knowing that HawgLite's *Po' Nock* kit does not fall within the valid and enforceable scope of any claims of the '784 Patent. On information and belief, DiCarlo made this threat in a deliberate attempt to stifle competition in the market for lighted or illuminated archery nocks.

32. On information and belief, DiCarlo and DiCarlo's agents or representatives have stated to others (including prospective HawgLite' customers in this judicial district and/or elsewhere) that HawgLite's *Po' Nock* kits are covered by and infringe DiCarlo's '784 patent.

33. On information and belief, DiCarlo's conduct in obtaining the '784 patent was designed to obtain an improper monopoly in illuminated archery nocks. As described herein, DiCarlo also conducted improper business practices such as making false statements about HawgLite and its products and attempting to interfere with prospective HawgLite sales and contractual relations to further its monopolistic and anti-competitive practices.

34. On information and belief, DiCarlo's goal by these and the other activities alleged herein was to reduce the competition for the sale of illuminated archery nocks and components for constructing illuminated archery nocks. By the activities alleged herein DiCarlo willfully has attempted to maintain and extend its monopoly in the illuminated archery nock market. DiCarlo